Office-Supreme Court, U.S.
FILED
MAY 31 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

E. GREY LEWIS AND CAROLYN G. LEWIS,
Petitioners,

v.

PORT PACKET CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

HARVEY B. COHEN
JOANNE F. ALPER
COHEN, GETTINGS, ALPER & DUNHAM
1400 North Uhle Street
Suite 500
Arlington, Virginia 22201
(703) 525-2260

Counsel for Respondent

May 31, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners may raise before this Court the issue of whether actual malice must be proven by "clear and convincing evidence" in order to sustain an award of punitive damages against a media defendant in a private figure defamation action where petitioners never raised that issue or objected to that standard of proof in either the trial court or the Supreme Court of Virginia, and further where the jury instructions proffered by petitioners required proof of actual malice by clear and convincing evidence.

2. Whether the Supreme Court of Virginia acted properly in reversing and setting aside an award of punitive damages of One Hundred Thousand Dollars after making an independent examination of the entire record according to this Court's ruling in *Bose Corp. v. Consumers Union of the United States, Inc.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
COUNTER STATEMENT OF FACTS	2
A. The Parties and Background Facts	2
B. The Decision of the Virginia Supreme Court	6
REASONS FOR DENYING THE WRIT OF CERTIORARI	7
I. PETITIONERS FAILED TO RAISE THE ISSUE OF THE LEVEL OF PROOF REQUIRED TO SUPPORT PUNITIVE DAMAGES BEFORE THE TRIAL COURT OR THE VIRGINIA SUPREME COURT	8
A. This Court Lacks Jurisdiction to Decide Petitioners' Standard of Proof Argument	8
B. This Court's Decisions Require That a Private Individual Plaintiff Must Prove Actual Malice by Clear and Convincing Evidence to Recover Punitive Damages	9
C. The Policy Considerations Regarding Punitive Damages are Different From Those Governing Compensatory Damages	10
II. THE INDEPENDENT EXAMINATION BY THE VIRGINIA SUPREME COURT WAS PROPER	11
A. Independent Appellate Review Does Not Require a Public/Private Distinction	11
B. The Virginia Supreme Court Properly Reviewed the Evidence as Required by This Court	11
CONCLUSION	14
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Bose Corp. v. Consumers Union of the United States, Inc., ____ U.S. ____, 104 S.Ct. 1949 (1984) .. *passim*

Dickey v. CBS, Inc., 583 F.2d 1221 (3rd Cir. 1978) 12

Doe v. Watson, 49 U.S. 263 (1849) 8

Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974) 12

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ... *passim*

Grzelak v. Calumet Publishing Co., 543 F.2d 579 (7th Cir. 1975) 12

Hotchner v. Castillo-Puche, 551 F.2d 910 (2nd Cir. 1977) 12

Lacks v. Bottled Gas Corp., 215 Va. 94, 205 S.E.2d 671 (1975) 9

New York Times v. Sullivan, 376 U.S. 254 (1964) 11

Rome v. Kelly Springfield Tire Co., 217 Va. 943, 234 S.E.2d 277 (1977) 8

Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980) 12

St. Amant v. Thompson, 390 U.S. 727 (1968) 12

Tavoulareas v. Washington Post, No. 83-1605 slip op. (D.C. Cir. April 9, 1985) 12-13

Vanderberg v. Newsweek, 507 F.2d 1024 (5th Cir. 1975) 12

Youakim v. Miller, 425 U.S. 231 (1976) 8

OTHER AUTHORITIES:

Rule 5:21, Rules of the Supreme Court of Virginia 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

E. GREY LEWIS AND CAROLYN G. LEWIS,

Petitioners,

V.

PORT PACKET CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

COUNTER-STATEMENT OF THE CASE

This is a libel action by a husband and wife, E. Grey Lewis and Carolyn G. Lewis (petitioners) against a newspaper, The Alexandria Port Packet (respondent) for statements published in an article on a matter of public and general concern: the growing problem of child abuse. The jury returned a verdict for the petitioners of Fifty Thousand Dollars compensatory damages and One Hundred Thousand Dollars punitive damages, despite the fact that the article never named petitioners or their child. Respondent herein, The Alexandria Port Packet, filed a Petition for Writ of Certiorari in this matter in this Court on May 2, 1985, No. 84-1722.

COUNTER-STATEMENT OF FACTS

A. The Parties and Background Facts[1]

The Alexandria Port Packet (the "Port Packet"), is a small weekly newspaper devoted exclusively to the coverage of the news and events of the City of Alexandria, Virginia. The newspaper is circulated throughout Alexandria and derives an insignificant portion of its income from street sales. (Record at 905) James W. Coldsmith ("Coldsmith") was at the time the subject article was published, the editor and publisher of the Port Packet.

In May 1980, Coldsmith and one of the paper's two reporters, Adrian Higgins ("Higgins") (Record at 881), became aware of and interested in the general and apparently growing problem of child abuse in Alexandria. To investigate, they met with Alexandria Commonwealth's Attorney, John Kloch, to discuss whether child abuse was indeed a problem in Alexandria. (Record 888-889) In view of information previously gathered and the clear indication that child abuse was an increasing problem in Alexandria, Coldsmith and Higgins proceeded with an article on the general issue of child abuse in Alexandria, which eventually became a two-part series published in July 1980. (Record at 889)

In preparing the series, Higgins interviewed the head of the Alexandria Child Protective Services Unit, Francine Rosenfeld, and a social worker in that office, Sandra Ryan; two Assistant Commonwealth's Attorneys, Jan Willis and

---

[1]In presenting the facts of this case, respondent relies upon the Virginia Supreme Court's recitation of the facts, J.A. at 31a through 34a, and also on the complete trial record contained in the Joint Appendix to this case when it was before the Virginia Supreme Court. To avoid confusion, references to the complete trial record set out in the Joint Appendix relied upon by the Virginia Supreme Court, are recited herein as "Record".

Randolph Sengal; Elizabeth Campagna, the director of Alexandria's Head Start Program (which deals with abused children); and reviewed a study of Alexandria jail prisoners that showed a link between child abuse and later criminal activity. (Record at 365-369) Also, a few days before the first article went to press (Record at 302), Higgins contacted Detective Sergeant Ronald Uhrig ("Sgt. Uhrig"), then Commander of the Youth Bureau Criminal Investigation Division of the Alexandria Police Department (Record at 444), to solicit information about the problem of child abuse. (Record at 297, 446) This conversation centered primarily on the problems faced by police in investigating and proving cases of suspected child abuse. (Record at 376) During the interview, Sgt. Uhrig provided Higgins with information on three cases (Record at 445-448, 456-459, 462-467) and told Higgins that each was a suspected child abuse case. (Record at 454) One involved a child who died of a fractured skull in 1978, in which an unsuccessful attempt was made to indict the child's parents. (Record at 364, 455)

With respect to the other two cases, Sgt. Uhrig told Higgins that each was currently being investigated and provided the following facts:

1. The dates that the cases came to the attention of the police (June 4th and 10th); (Record at 304)

2. The ages of the children (9 months and 2 years); (Record at 304, 310)

3. The hospitals that had treated the children (The Alexandria Hospital and Children's Hospital); (Record at 375)

4. The time that each child lived after his injury (2 days and 2 weeks); (Record at 304)

5. That both children had died of skull fractures that were not consistent with falls; (Record at 304, 462-463)

6. That both cases were classified as suspicious deaths and were being treated or investigated as homicides. (Record at 375, 465)

Sgt. Uhrig did not provide the names of the children (Record at 464) or any information as to the identity of any subjects of the investigations or suspected abusers.[2] Higgins did not attempt to elicit such information since he knew that the police were prohibited from disclosing information on the subjects of pending investigations. (Record at 298) In fact, at no time prior to the filing of this suit did anyone at the newspaper have any knowledge of the identities of the deceased children or the persons being investigated by the police. (Record at 299-301, 370-371, 899)

The petitioners in this action had an infant son who was nearly nine months old (Record at 204) on June 10, 1980, when he suffered a fractured skull after allegedly falling from a bed in their home. (Record at 205) The child was taken to Alexandria Hospital (Record at 205) where he died from his injuries on June 12th. (Record at 211) On June 13th, Dr. James Beyer, the Medical Examiner for Northern Virginia, conducted an autopsy on the Lewis child. (Record at 769)

At about 9:45 a.m. that same day, Dr. Beyer telephoned Detective Thomas Morehead ("Det. Morehead"), an investigator with the homicide division of the Alexandria Police Department. (Record at 768) Dr. Beyer advised Det. Morehead that the Lewis child's skull fracture was not consistent with a normal fall (Record at 769) and that the case should be investigated by the police as a potential homicide. (Record at 786)

---

[2]Throughout the articles, Higgins used fictitious names for these cases: "Mark" and "Robert".

Det. Morehead obtained the names and address of the child's parents (Record at 770), and then contacted Randolph Sengal, (Record at 772) the Assistant Commonwealth's Attorney then assigned to the prosecution of homicides. After Det. Morehead related the information given by Dr. Beyer, Mr. Sengal and Det. Morehead initiated their homicide investigation at the Lewis home. (Record at 773)

Det. Morehead and Mr. Sengal interviewed the Lewises and received written statements from them. (Record at 773) Thereafter, Det. Morehead discussed the details of the Lewis investigation with Sgt. Uhrig (Record 451, 786-787), and formed the opinion that the child may have been abused. (Record at 786-787)

As of July 16, 1980, the date the Port Packet article was published, the death of the Lewis child was being investigated by the Alexandria Police as a potential homicide and suspected child abuse case. (Record at 790) At that time, the only subjects of the police investigation were the child's parents, Mr. and Mrs. Lewis. The fact that the Lewises were subjects of the investigation was never released to the reporter Higgins. The Port Packet first learned of this fact upon receipt of the petitioners' suit.

In writing the article, Higgins intended to inform the paper's readers, in general terms, of a growing social problem in Alexandria. (Record at 372) The story was not intended to deal specifically or in detail with the deaths of the children. (Record at 372) The information Higgins received from Sgt. Uhrig about those cases was included in the story, as were five other instances, to illustrate and emphasize the immediacy of this growing social problem. (Record at 369)

Sgt. Uhrig was Higgins' only source for the information on "Mark" in the article. Higgins did not believe it necessary to obtain further verification of the information provided by

Sgt. Uhrig since he understood and believed Sgt. Uhrig was conducting the investigation. (Record at 280, 380) Further, Higgins knew that an attempt to verify Sgt. Uhrig's information with any other person in a position to know would be futile, since such matters are held in strict confidence by the police. (Record at 316)

Coldsmith reviewed and edited Higgins' article prior to its publication (Record at 898) and discussed its progress with Higgins several times previously. (Record at 893) Coldsmith had confidence in and trusted Higgins' ability and experience as a reporter (Record at 895), and also knew that Sgt. Uhrig was the source of the information about "Mark" and "Robert," and that he was a trustworthy source who could be relied upon without need to obtain a second report. (Record at 892, 895) Coldsmith also believed that the article conformed to the applicable journalistic standards. (Record at 913)

The Lewises made no effort to contact anyone at the Port Packet either to advise the newspaper that the article contained inaccuracies or to request a clarification or retraction. (Record at 683)

B. The Decision of the Virginia Supreme Court

On appeal, the Virginia Supreme Court affirmed the jury's verdict of Fifty Thousand Dollars compensatory damages, and announced that it would adopt a negligence standard for recovery by private individual plaintiffs in defamation actions.[3] With respect to the award of One Hundred Thousand Dollars punitive damages, the Virginia Supreme Court conducted an independent examination of the entire record according to *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, 104 S.Ct. 1949

[3]The Port Packet has challenged that ruling in its Petition for Certiorari filed in this Court on May 2, 1985, No. 84-1722.

(1984), and determined that "the evidence is not sufficient to support a finding of New York Times 'actual malice' by clear and convincing proof." (J.A. at 43a) Petitioners herein seek to challenge that ruling on the grounds that (a) there is no basis to require proof of *New York Times* 'actual malice' by clear and convincing proof in cases involving private individual plaintiffs; (b) that the Supreme Court of Virginia misapplied this Court's holding in *Bose*, *supra*, by conducting an independent review of the factual determinations underlying the jury's finding of actual malice; and (c) by asking this Court to review the "circumstantial" evidence which allegedly supports the award of punitive damages.

REASONS FOR DENYING THE WRIT OF CERTIORARI

This Court has no jurisdiction to grant a Writ of Certiorari on an issue which was not first raised in the trial and appellate courts below. Petitioners' first issue, questioning whether *New York Times* malice must be proven by clear and convincing evidence to support an award of punitive damages was not raised by petitioners at either the trial or appellate levels of this case. Accordingly, this Court has no jurisdiction to grant a Writ of Certiorari on that issue.

Further, petitioners misstated the action of the Virginia Supreme Court in reviewing the record of the lower court to determine that the jury's finding of *New York Times* malice was unsupported by sufficient evidence. Finally, it is not the province of this Court to re-review the evidence at the trial court level, an exercise which has already been done by the Virginia Supreme Court in great depth, in order to determine, as urged by petitioners, that the circumstantial evidence established proof of *New York Times* malice.

I. PETITIONERS FAILED TO RAISE THE ISSUE OF THE LEVEL OF PROOF REQUIRED TO SUPPORT PUNITIVE DAMAGES BEFORE THE TRIAL COURT OR THE VIRGINIA SUPREME COURT

A. This Court Lacks Jurisdiction to Decide Petitioners' Standard of Proof Argument

At trial, both parties proffered to the court a jury instruction on punitive damages.[4] After a short discussion, petitioners voluntarily withdrew their instruction and counsel stated: "For the record, I will withdraw [instruction] 16 so that there is no question that I am not challenging the Court's ruling." (Record at 998) Thereafter, the parties and court agreed to use respondent's instruction M. (Record at 1052) A comparison of both instructions shows that each required proof of *New York Times* malice by "clear and convincing evidence" for recovery of punitive damages. Petitioners clearly never objected to this charge at trial.

It is well settled that an objection to a jury instruction which is first made in the appellate court will not be heard. *See, e.g., Rome v. Kelly Springfield Tire Co.*, 217 Va. 943, 234 S.E.2d 277 (1977); Rule 5:21, *Rules of the Supreme Court of Virginia*. Since the Virginia Supreme Court lacked jurisdiction to hear the issue, this Court is also barred from deciding petitioners' argument. The Supreme Court does not decide questions not raised or resolved below. *Youakim v. Miller*, 425 U.S. 231 (1976). *See also, Doe v. Watson*, 49 U.S. 263 (1849) (an objection to an instruction made for the first time before the appellate court comes too late).

In Virginia, since the instruction was not challenged, it becomes the law of the case and the court will not challenge

---

[4]Both instructions are reproduced in the appendix attached hereto at pages 1a and 2a.

the correctness of the legal principle. *Lacks v. Bottled Gas Corp.* 215 Va. 94, 96, 205 S.E.2d 671, 673 (1975). Based on these basic principles of law, this petition for Writ of Certiorari should be dismissed.

B. This Court's Decisions Require that a Private Individual Plaintiff Must Prove Actual Malice by Clear and Convincing Evidence to Recover Punitive Damages

Petitioners assert that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), left unresolved whether private individual plaintiffs must prove actual malice by a "clear and convincing" or a "preponderance of the evidence" standard in order to recover an award of punitive damages for defamation. A careful reading of this Court's opinions shows that petitioners' position is erroneous.

In *Gertz*, where the plaintiff was a private individual, this Court integrated the "clear and convincing" standard of proof into its definition of *New York Times* actual malice. 418 U.S. at 342. In clarifying the standard as applied to private individuals, the Court held that:

> The private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury. 418 U.S. at 350.

Most recently in *Bose Corp. v. Consumers Union of U.S., Inc.*, this Court again stated that:

> The burden of proving 'actual malice' requires the plaintiff to demonstrate with *clear and convincing evidence* that the defendant realized his statement was false or that he subjectively entertained serious doubts as to the truth of this statement. ____ U.S. ____, 104 S. Ct. 1949, 1965, fn. 30 (1984) (emphasis added).

By employing the following syllogism (at the risk of being repetitious), it is obvious that clear and convincing proof is required in situations where a private plaintiff is seeking punitive damages:

1. A private plaintiff who proves less than *New York Times* actual malice may only recover compensatory damages and not punitive damages. *Gertz*, 418 U.S. at 350

2. New York Times "actual malice" must be proven by clear and convincing evidence. *Bose*, 104 S.Ct. at 1965, fn. 30

3. Therefore, a private plaintiff seeking punitive damages must prove "actual malice" by clear and convincing evidence.

Contrary to petitioners' assertions, the issue of standard of proof required for punitive damages in this case has previously been resolved by this Court.

C. The Policy Considerations Regarding Punitive Damages are Different From Those Governing Compensatory Damages

Petitioners next assert that the policy reasons in *Gertz* should be read to allow a "preponderance of the evidence" standard. However, in discussing punitive damages in defamation cases, this Court has never focused on the public official/private individual distinction. Rather, this Court has focused on the important goal of protecting the First Amendment.

Further, contrary to petitioners' argument that *Gertz* allows the states greater latitude to protect the reputations of private individuals, this Court has explicitly stated that there is *no* state interest in allowing individuals to recover *punitive* damages for defamatory remarks. *Gertz*, 418 U.S.

at 348-350. The rationale for the stricter standard is that "jury discretion to award punitive damages exacerbates the danger of media self-censorship. . . ." *Id.* This *caveat* applies to cases involving both public and private figures. It is obvious that with regard to punitive damages, this Court found no basis to make such a distinction.

II. THE INDEPENDENT EXAMINATION BY THE VIRGINIA SUPREME COURT WAS PROPER

A. Independent Appellate Review Does Not Require a Public/Private Distinction

Petitioners suggest that since the case at hand involves a private figure, the appellate court should not have conducted a rigorous scrutiny of the evidence at trial. This proposition is absurd. *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny have never required a public official/private individual distinction in the area of appellate review of punitive damages. In order to insure that the First Amendment freedoms of speech and press are properly protected, this Court has required independent review of the evidence by appellate judges where punitive damages are awarded. *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, 104 S.Ct. 1949 (1984)

B. The Virginia Supreme Court Properly Reviewed the Evidence as Required by this Court

This Court's requirement of independent appellate review reflects a deeply held conviction that judges, instead of jurors, must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. *Accord, Bose Corp. v. Consumers Union of United States, Inc., supra.* This Court recognized that First Amendment freedom is too important to be left solely to a jury. Hence, the established requirement that appellate judges must "independently decide whether the evidence in

the record is sufficient to cross the constitutional threshhold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.*, 104 S.Ct. at 1965.

Contrary to petitioners' assertion, the Virginia Supreme Court did no more than that which it was required to under *Bose* and *New York Times*. *Bose* requires an assessment of the evidence germane to the actual malice determination. ___ U.S. ___, 104 S.Ct. at 1967, fn. 31. The Virginia Supreme Court made an independent review of the evidence and found that the record did not establish the required actual malice with convincing clarity. JA 43a.

In examining the pertinent evidence to support punitive damages, the Virginia Supreme Court found that the articles were researched in depth. Petitioners disagree with this conclusion. This Court has often stated that "mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) Several courts have used negative implication to find that:

> As long as the sources of the libelous information appeared reliable, and the defendant had no serious doubts about its accuracy, the evidence of malice [is] insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error. *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980); *See, Dickey v. CBS, Inc.*, 583 F.2d 1221, 1227 (3rd Cir. 1978); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 912-14 (2d Cir. 1977); *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 583 (7th Cir. 1975); *Vanderberg v. Newsweek*, 507 F.2d 1024, 1026-1028 (5th Cir. 1975); *Drotzmanns Inc. v. McGraw-Hill, Inc.* 500 F.2d 830, 834 (8th Cir. 1974).

Petitioners cite a recent opinion of the U.S. Court of Appeals for the D.C. Circuit, *Tavoulareas v. Washington*

Post, No. 83-1605, slip op. at 22-25 (D.C. Cir., April 9, 1985) for the proposition that the appellate court is prohibited from conducting a *de novo* review of the factual findings of evidence. Whether this opinion will become precedent is probably for later decision by this Court. Nevertheless, the *Tavoulareas* court interpreted *Bose* as permitting an appellate court to exercise its independent judgment only to the ultimate conclusion of clear and convincing proof of actual malice. *Id.* at 22-23. This is precisely what the Virginia Supreme Court did in applying its independent judgment to the ultimate conclusion and finding, after an examination of the evidence that "the record is devoid of evidence to show that the reporter or editor knew the defamatory statements were false." (J.A. at 43a)

Petitioners' final assertion is that in reviewing the evidence the Virginia Supreme Court failed to take into account circumstantial evidence tending to prove the "reckless disregard" component of actual malice. There is nothing in the Virginia Supreme Court's opinion indicating that it did not take this evidence into account. To the contrary, the opinion states that the Court reviewed "all of the evidence." (J.A. at 43a.) Petitioners state that the appellate court relied on the editor's bare assertion that he believed it complied with standards of proper journalism. However, based upon its independent review of all of the evidence, the Virginia Supreme Court found that the article had been investigated thoroughly, and that neither the reporter nor the editor knew that the statements were false.

Petitioners are attempting to have this Court re-review the record of the trial court. This exercise has already been properly conducted by the Virginia Supreme Court. It is beyond the province of this Court to re-review each independent factual determination found at trial. Since the Virginia Supreme Court properly reviewed all the evidence and

found it insufficient to prove actual malice with clear and convincing clarity, the petition for Writ of Certiorari should be dismissed.

CONCLUSION

Petitioners' failure to object to the standard of proof regarding punitive damages at trial and on appeal propel that issue out of the reach of this Court. The remaining claims of petitioners were given careful scrutiny by the Supreme Court of Virginia and were decided well within the boundaries and guidelines enunciated by this Court's rulings and do not require review or reversal by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HARVEY B. COHEN
JOANNE F. ALPER
COHEN, GETTINGS, ALPER & DUNHAM
1400 North Uhle Street
Suite 500
Arlington, Virginia 22201
(703) 525-2260

APPENDIX

APPENDIX

INSTRUCTION NO. 16

If you find that the plaintiffs are entitled to be compensated for the damages, and if you further find by clear and convincing evidence that the defendant knew the statements to be false, or published the statements with reckless disregard for whether they were true or not, then you may also award punitive damages to punish the defendant for its actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages, and the amount you allow as punitive damages.

Authority: Dixon v. Newsweek, Inc. 562 F2d 626 and 629 [10th Cir. 1977]

INSTRUCTION NO. M

If you find that the plaintiffs are entitled to be compensated for their damages, and if you further believe by clear and convincing evidence that the defendant made the statements with actual malice; that is, he knew they were false or he made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for his actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

Virginia Model Jury Instructions, No. 37.110